IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 81-2187 and 81-2637
CLINTON T. FROCK and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

On Petitions to Review Orders of
the Railroad Retirement Board.

ARGUED FEBRUARY 12, 1982 —
DECIDED AUGUST 6, 1982

Before SPRECHER* and BAUER, Circuit Judges, and BONSAL, Senior District Judge.**

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* Circuit Judge Robert A. Sprecher heard oral argument, participated in the conference which followed, and voted to affirm. He died May 15, 1982, and did not participate in the preparation or approval of this opinion.

(cont.)

BAUER, Circuit Judge. These petitions involve the applicability of section 3(h)(6) of the Railroad Retirement Act, 45 U.S.C. section 231b(h)(6), to railroad workers applying for dual benefits following this court's decision in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), and the constitutionality of that section if it is applied to these workers. Because we find that section 3(h)(6) was correctly applied and is constitutional, we uphold the Railroad Retirement Board's decisions denying dual benefits to the petitioners.

I

Clinton T. Frock and Charles L. Stribling (collectively "petitioners") are retired railroad workers entitled to annuities under the Rail-

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** Honorable Dudley B. Bonsal, Senior District Judge for the Southern District of New York, is sitting by designation.

road Retirement Act of 1974, 45 U.S.C. section 231 et seq ("RRA"). Both men are married to spouses who were fully insured under the Social Security Act, 42 U.S.C. section 301 et seq., prior to January 1, 1975. Social security benefits and railroad retirement annuities are distributed to railroad workers and their families by the Railroad Retirement Board ("Board"). 45 U.S.C. section 231(b)(2).

In 1977, Frock and Stribling became eligible to receive spousal social security benefits as a result of the Supreme Court's decision in Califano v. Goldfarb, 430 U.S. 199 (1977). There the Court held that a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouse in order to receive spousal social security benefits violated the Fifth Amendment. In response to Goldfarb, the Board provided all workers with spousal social security benefits. This action was based on 45

U.S.C. section 231b(m), which precludes "dual" or "windfall benefits to retired railroad workers; the Board considered the receipt of both a railroad retirement annuity and spousal social security benefits to constitute such "dual" or "windfall" benefits.[1] The Board then read 45 U.S.C. sections 231b(h)(3) and (4) to mandate the restoration of dual benefits to female railroad retirees and male railroad retirees able to prove dependency upon their

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[1] 45 U.S.C. section 231b(m) provides:

The annuity of any individual under subsection (a) of this section for any month shall ...be reduced, but not below zero, by the amount of any monthly benefit...payable to that individual for that month under title II of the Social Security Act [pertaining to federal old-age, survivor, and disability insurance benefits].

Spousal social decurity benefits are "windfall benefit. when disbursed to railroad retirement annuity recipients because railroad retirement annuities are already subsidized by Social Security Act funds. S.Rep.No. 93-1163, 93d Cong., 2d Sess. 2-3, reprinted in [1974] U.S.CODE CONG. & AD. NEWS 5702, 5708.

wives. Under those sections, persons whose spouses were "permanently insured under the Social Security Act on December 31, 1974" were to receive an increase in annuity benefits equal to the social security benefits to which they "would have been entitled ... under the provisions of the Social Security Act as in effect on December 31, 1974." Thus, those who were entitled to dual benefits in 1974 would still be entitled to them. The Board interpreted "as in effect on December 31, 1974" to mean that eligibility for dual benefits was to be based on social security eligibility standards in effect before the Supreme Court's 1977 Goldfarb decision.

This court, in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), held that the Board's interpretation of this eligibility standard was incorrect. Although not reaching any constitutional issues,

we found that it was improper to read 45 U.S.C. sections 231b(h)(3) and (4) as evincing a design to base receipt of dual benefits upon the dependency requirements invalidated in Goldfarb. We declined, however, to certify a class in Gebbie, so that only the petitioner there became entitled to collect dual benefits.

Following Gebbie, Frock sent a letter to the Board on February 27, 1981, requesting dual benefits in light of that decision. Frock had been denied the benefits in 1977. On March 18, 1981, the Board sent Frock a letter in which it refused to reopen his administrative claim on the basis that Frock had failed to file a timely administrative complaint after the 1977 denial of benefits. See 45 U.S.C. section 231g. Frock then filed a Petition for Review with this court on July 27, 1981.

Stribling had filed a timely objection when he was denied dual benefits in 1978, and

was pursuing his administrative remedies at the time of the Gebbie decision. One year after Gebbie, however, by a letter dated July 27, 1981, Stribling was notified that his appeal had been denied. The Board's letter stated that it had declined to apply Gebbie to any other cases. Having exhausted his administrative remedies, Stribling filed his Petition for Review with this court on October 15, 1981.[2]

While Frock's petition was pending before this court, and shortly after the Board's final disposition of Stribling's claim, Congress

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[2] Under 45 U.S.C. section 231g, decisions of the Board are subject to court review as provided under the Railroad Unemployment Insurance Act, 45 U.S.C. section 351 et seq. That Act permits petitioners to file suit in the court of appeals for the circuit in which they reside, in the District of Columbia Circuit, or in the Seventh Circuit. 45 U.S.C. section 355(f).

added section 3(h)(6) to the RRA.[3] This section eliminated dual benefits for anyone whose entitlement to those benefits had not been "determined" by August 13, 1981. Section 3(h)(6) forms the basis of the dispute in this case. The Board asserts that this provision bars the claims at issue here, because in neither case has the peitioner been determined by a court or by the Board to be entitled to dual benefits. The petitioners argue that the provision does not apply to them because their positions are indistinguishable from that of the plaintiff in Gebbie, and therefore that Gebbie determined their entitlement to dual benefits. In the alternative, they argue that section 3(h)(6) is unconstitutional.

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[3] 45 U.S.C. section 231b(h)(6). This section provides:

No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981.

II

Initially, we face a jurisdictional question. Although the Board concedes that Stribling's claim is properly before this court, the Board argues that this court lacks jurisdiction over Frock's claim because of Frock's failure to exhaust his administrative remedies and his lack of timeliness in filing a claim. We reject both these contentions, and find that Frock has properly invoked this court's jurisdiction.

The Board contends that, despite the fact that the Board unequivocally denied dual benefits to Frock, he was nevertheless required to pursue his administrative remedies before bringing this action. Under the regulations in effect when Frock's annuity benefits were first reduced, Frock was authorized to appeal any adverse decision by the Board through an extensive administrative appeals system.

20 C.F.R. sections 260.2, 260.3 (1977). Failure to file a final administrative appeal forfeited any right to further review of the decision. 20 C.F.R. section 260.3(c) (1977). These regulations continue in effect today. 20 C.F.R. sections 260.4, 260.6 (1982). Finally, section 8 of the RRA provides for court review of Board decisions "only after all administrative remedies within the Board will have been availed of and exhausted." 45 U.S.C. section 231g (incorporating section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. section 355(f)). Frock, however, did not begin to seek review of the Board's denial of dual benefits to him until 1981, and that administrative process has never been completed. Thus, the Board argues, this court lacks jurisdiction over Frock's claim because Frock has failed to exhaust his administrative remedies.

We disagree. First, Frock's case falls within an exception to the general exhaustion rule for cases in which exhaustion would have been "a futile gesture." Porter County Chapter of Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (7th Cir.), cert. denied, 439 U.S. 834 (1978). Here, the Board clearly indicated in a letter to Mr. Frock's counsel that "[t]he Board is not applying the decision in the Gebbie case on a class basis," meaning that the Board did not consider anyone in Frock's position to be entitled to dual benefits under 45 U.S.C. sections 231b(h)(3) and (4). Under such circumstances, pursuing administrative "remedies" would indeed have been a futile gesture.

Furthermore, courts have not required parties to exhaust administrative remedies where the purposes of exhaustion would not be served. "The basic purpose of the exhaus-

tion doctrine is to allow the administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Continental Can Co. v. Marshall, 603 F.2d 590, 597 (7th Cir. 1979). Accord, Weinberger v. Salfi, 422 U.S. 749, 765 (1975). None of these purposes would be served by requiring exhaustion here. There is no need for development of a factual record, for the facts are not in dispute. No application of agency expertise is involved, and a formal decision by the Board not to follow Gebbie effectively precludes the Board from mooting the controversy.[4]

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[4] Although it is conceivable that Frock could persuade the Board to change its policy, we believe that to require exhaustion in the face of a clearly contrary Board decision would be a waste of administrative resources. See Weinberger v. Salfi, 422 U.S. 749, (cont.)

The Board argues, however, that even if Frock was not required to exhaust his administrative remedies, this court still lacks jurisdiction because Frock failed to protest the Borad's action within the statutorily required time period. The Board argues that, under 45 U.S.C. section 231g, Frock was required to object to the reduction of his annuity within one year of the date it was reduced. Thus, the Board argues, Frock's failure to protest his annuity reduction within one year of September 1977, the date the Board decided to reduce his annuity, precludes any further review of the Board's actions.

Once again, we disagree. At the very least, Frock is entitled to bring this action as an appeal from the Board's refusal to rein-

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4 (cont.)
765-66 (1975); Continental Can Co. v. Marshall, 603 F.2d 590, 596-97 (7th Cir. 1979).

state his annuity benefits after Gebbie. Frock's letter of February 27, 1981, requested reinstatement of his reduced annuity, which the Board permits pursuant to 20 C.F.R. section 200.1(vi) (1981). When the Board, by its letter of March 18, 1981, refused to reinstate Frock's benefits, Frock timely filed his Petition for Review with this court. Thus, Frock's case is properly before this court.[5]

III

A

Frock and Stribling claim that this court's decision in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), established their right to dual benefits. They argue, therefore, that section 3(h)(6), which prohibits dual payments "to an individual ... unless the entitlement of such individual to such amount" was determin-

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[5] Because of the decision we reach herein, we need not address the more difficult question raised by Frock of whether the Board's

ed before August 13, 1981, simply does not apply to them.

Section 3(h)(6) specifically precludes dual benefits unless an individual has been determined to be eligible by the date of enactment. Such language clearly contemplates a specific determination of entitlement.[6]

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5 (cont.)
Initial letters provided sufficiently clear notice of the reasons for terminating his annuity.

6
This meaning is clear from the discussion of the section in the Report of the Conference Committee on the Budget Reconciliation Act. In explaining the Senate version of section 1118(e), which was ultimately adopted by Congress as section 3(h)(6), the Committee explained:

> The senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May, 1981, or the enactment date, to any employee based on a spouse's Social Security Act employment. The intent of the provision "unless entitlement of such individual to such amount had been determined prior [sic] the date of the enactment of this subdivision" is to cut off windfall awards in all cases

Neither Frock nor Stribling had received such a determination by August 13, 1981, and therefore section 3(h)(6) does indeed operate to block dual benefits for them.

Frock and Stribling appear to read Gebbie as a class action, determining the rights of all those similarly situated. Yet this court specifically declined to certify a class in Gebbie on the ground that this court was "not an appropriate forum for such an action." 631 F.2d at 516 n.9. Thus, Gebbie decided only the entitlement of the individual petitioner in that case.[7]

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6 (cont.)
where the processing has, for whatever reason, not been completed and the determinations have not been made.
H.R. REP. NO. 97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1225 (emphasis added).

7 Thus, in order to reap the benefits of the Gebbie decision, workers had to bring either individual or class actions. One individual did appear before this court, where his entitlement to dual benefits was deter-
(cont.)

Frock and Stribling, however, place great weight upon the fact that the Board did not appeal the Gebbie decision. The failure to do so, they allege, bound the Board to apply Gebbie in all cases. An unappealed circuit court decision concerning agency action, however, does not have the effect of setting a nationwide agency standard. Federal appellate courts can, and do, differ in their conclusions as to the law affecting agency action. See Davis v. Califano, 603 F.2d 618, 627-28 (7th Cir. 1979) (differing with Second Circuit's opinion in Rosenberg v. Richardson, 538 F.2d 487, 490 (2d Cir. 1976), as to entitlement to certain types of social security benefits). Due to the nature of the statutory grant of jurisdiction in this

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7 (cont.)
mined, Shuff v. United States Railroad Retirement Board, No. 80-2791 (7th Cir. Apr. 9, 1981)(unpublished order), and a class action is pending before the district court, Forseth v. United States Railroad Retirement Board, No. 81-C-3742 (N.D.Ill.).

case, a petitioner could bring an action in any one of three circuits.[8] To find that this circuit's determination governed the Board's actions in all other circuits would be to make this circuit the ultimate decisionmaker simply because it was the first court presented with the issue.[9] We do not believe that the Board's decision not to appeal Gebbie dictates such a conclusion. We are unaware of any decision requiring an agency to either appeal

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[8] See note 2, supra.

[9] Because petitioners could appeal Board decisions in any one of three circuits, the Board had no way of determining which circuit would ultimately review its decision in any individual case. Thus, the nature of the jurisdictional grant under the RRA serves to distinguish this case from those in which lower courts have imposed a duty upon agencies to apply the rulings of the court to all cases within that court's geographic jurisdiction. See, e.g., Flores v. Secretary of Health, Education & Welfare, 228 F.Supp. 877, 878 (D.P.R. 1964)(decision of a particular court must be obeyed by an agency within that court's jurisdiction absent modification or reversal of that decision).

a circuit court's holding or accept it as binding on the agency in all circuits where review could have been sought. Thus, the scope of this court's Gebbie decision was necessarily limited to the rights of the litigant in that case, and the agency was bound to comply with this court's decision only with regard to that litigant.

B

Having found that section 3(h)(6) was properly applied to Frock and Stribling, we reach the petitioners' constitutional challenge that the statute violates the Fifth Amendment guarantees of due process and equal protection.[10] First, Frock and Stribling contend that the statute violates due process by conditioning receipt of dual benefits upon an external occurrence unrelated to eligibility --certification of entitlement by the Board

[10] While the Fifth Amendment does not explicitly guarantee equal protection, courts have recognized that the Amendment includes (cont.)

or a court. Second, Frock and Stribling argue that the statute violates equal protection by perpetuating the differential proof of dependency requirement declared unconstitutional in Califano v. Goldfarb, 430 U.S. 199 (1977).

1

The petitioners claim that resting eligibility for benefits upon the time when a person's entitlement to those benefits has been determined by a court or the Board violates due process. This is impermissible, say the petitioners, because it conditions their right to benefits upon when the Board or a court acts affirmatively upon their request for bene-

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10 (cont.)
an equal protection component prohibiting discrimination that is "so unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

fits, rather than upon when they became eligibile for benefits.

To condition dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process.[11] "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program ..., we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Califano v. Goldfarb, 430 U.S. 199, 210 (1977) (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)).[12] Here,

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[11] Because Gebbie did not decide the entitlement of nonparties to that case, we reject the petitioners' characterization of the Board's refusal to apply Gebbie to their cases as "illegal action."

[12] "[R]ailroad benefits, like social security benefits, are not contractual and may be al- (cont.)

Congress, faced with a system in severe financial distress, sought to put a final end to dual benefits. See H.R. REP. NO.97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1224. Faced with our Gebbie decision, which threatened to impose significant financial burdens upon the railroad retirement system, Congress declared that any employees, male or female, whose entitlement to dual benefits had not been decided by the enactment date would not receive them. The decision not to revoke the benefits of those who had been determined to be eligible for them was a rational means of recognizing expectations created by court decisions and Board actions. Consideration of such expectations is a legitimate concern of Congress. See

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12 (cont.)
tered or even eliminated at any time." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980). See Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1979).

United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 178 (1980).

The petitioners cite no support for the proposition that hinging the right to dual benefits upon a determination of entitlement violates due process. Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), is inapposite. There, the Court held that where a state official failed to conduct a statutorily mandated procedure, due process was violated. Here, however, there is no procedure which the petitioners claim was denied them. Rather, the petitioners object that a procedure was required before benefits would vest.[13] We therefore find no violation of due

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[13] The petitioners suggest that the Board took an excessive amount of time in processing their applications. We note, however, that the petitioners do not claim that the Board deliberately delayed action on their applications in anticipation of the passage of section 3(h)(6). Nor is there any evidence in the record to support this conclusion. Unfortunately, the Board has apparently had (cont.)

process in Congress' decision to condition the receipt of dual benefits upon whether or not the petitioners' entitlement to benefits had been determined as of the date that section 3(h)(6) was enacted.

2

Frock's and Stribling's equal protection claims rest upon their characterization of section 3(h)(6) as an attempt to "grandfather in" an interpretation of 45 U.S.C. sections 231b(h)(3) and (4) which was violative of the Equal Protection Clause. Section 3(h)(6)

[13 (cont.)
considerable difficulty in processing claims on a timely basis, so that the two-year period between the filing of Stribling's application and its final denial does not seem unusual. See, e.g., Kelly v. Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980) (more than three years to process disability claim); Parker v. Railroad Retirement Board, 441 F.2d 460 (7th Cir. 1971) (dependents' disability application pending for over six years).

precludes dual benefits for anyone whose eligibility had not been determined by August 13, 1981. Thus, those entitled to dual benefits under the statute are persons who were eligible for dual benefits under the Board's interpretation of 45 U.S.C. sections 231b(h)(3) and (4), and those who successfully litigated their entitlement in court. The Board's interpratation was that pre-Goldfarb standards were to be applied to establish eligibility. As we noted above, the Gebbie court never decided the constitutionality of this application of sections 231b(h)(3) and (4), but the court suggested that this application was contrary to Goldfarb. Frock and Stribling argue that because section 3(h)(6) permits this application to stand, it violates equal protection by discriminating on the basis of gender.[14] Such a result, however,

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[14] The Supreme Court has noted that a social insurance system under which women receive

is not supported by equal protection analysis.

Numerous cases enunciate the strict standard to be applied to statutes which are explicitly gender-based. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455 (1981); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976). These cases, however, fail to provide guidance for our analysis here. Section 3(h)(6) is, on its face, gender-neutral. It simply states that if an individual has not been determined to be eligible for dual benefits by the date of the section's enactment, then that person

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14 (cont.)
more in spousal benefits than men acts to discriminate against women. Califano v. Goldfarb, 430 U.S. 199, 208 (1977). This result stems from the fact that systems such as social security base benefits paid upon the contribution of the wage-earner. Thus, when women receive more than men in spousal benefits, it means that the contributions of men have purchased more benefits than the contributions of women. Id.

cannot receive a windfall benefit. Thus, we must determine whether section 3(h)(6) operates in practice to violate equal protection.

The Supreme Court explained the proper method of analyzing a facially neutral statute for equal protection violations in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). There, the Court upheld a statute which, though neutral on its face, operated "overwhelmingly" in favor of males by providing employment benefits to veterans who had at least one day of "wartime service." Id. at 269. The Court enunciated a "a twofold inquiry:"

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based

> discrimination .... In this second inquiry, impact provides an "important starting point,"... but purposeful discrimination is "the condition that offends the Constitution."

Id. at 274 (citations omitted) (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)). In determining whether a law is covertly gender-based the Court suggested looking to the purposes of the statute. However, "[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." Id. at 275. In Feeney the Court found that the purpose was the neutral one of rewarding veterans for service to their country. Thus, the Court ruled, "this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can

rationally be explained on that ground." Id. The Court noted that, while the beneficiaries of the statute were overwhelmingly male, many women were covered, and many men were not covered.

Similarly, the statute here is clearly explainable in terms of a non-discriminatory purpose. By enacting section 3(h)(6) Congress sought to eliminate dual benefits while ensuring continued benefits to those who had been receiving such benefits. H.R. REP. NO. 97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1225.[15] Indeed, section 3(h)(6) cannot

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[15] This attempt to continue dual benefits to those already receiving them is consistent with long-stated policy under the RRA. "[C]utting off the benefits of those already receiving or legally entitled to them would clearly be inequitable. These individuals have a right to receive those benefits the law has led them to rely upon or expect." S. REP. NO 93-1163, 93rd Cong., 2d Sess. 4, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5702, 5705.

rationally be explained as an effort to discriminate on the basis of gender. The class of persons excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be composed of men and women.[16]

Having determined that section 3(h)(6) is indeed gender-neutral, we must look to "whether the adverse effect [of the statute] reflects invidious gender-based discrimination." In order to establish invidiousness, petitioners must show "that a gender-based discriminatory purpose has, at least in some measure, shaped the ... legislation."

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[16] Benefits will be provided to men and women who met the eligibility requirements as interpreted by the Board—married or widowed men who were able to prove dependency upon their spouses and all married or widowed women, and men who successfully challenged the Board's interpretation in court.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 276 (1979). In proving discriminatory purpose, the petitioners must establish "more than intent as volition or intent as awareness of consequences." Id. at 279. Rather, they must establish "that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. Here, however, the legislative history is clear that Congress passed section 3(h)(6) not in an attempt to discriminate against anyone on the basis of sex, but rather in an attempt to forestall bankruptcy of the railroad retirement system by eliminating dual benefits for both men and women. United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 169 n.2 (1980). The petitioners, therefore, have failed to establish that Congress passed section 3(h)(6) with an "in-

vidious gender-based discriminatory purpose." Thus, because section 3(h)(6) passes the two-tier analysis enunciated in Feeney we find no violation of the Fifth Amendment's guarantee of equal protection.

IV

We find, therefore, that section 3(h)(6) was properly applied to deny dual benefits to the petitioners in this case, and that the section does not violate the Fifth Amendment. Accordingly, the decisions of the Railroad Retirement Board denying dual benefits to Frock and Stribling are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

REGISTERED MAIL
Return receipt requested

July 27, 1981

Mr. Charles L. Stribling
1314 Creswell Street
Waycross, Georgia 31501

In reply refer to.
R.R.B. No. A-718-12-4337

Dear Mr. Stribling:

There is enclosed a copy of the decision of the Railroad Retirement Board on your application for benefits under the Railroad Retirement Act. The Board regrets that the circumstances in your case afford it no alternative to the conclusions reached in its decision.

Very truly yours,

R. F. Butler
Secretary of the Board

Enclosure

cc: Mr. Newton G. McCoy
Friedman Weitzman & Friedman
Attorneys at Law
The Advocate Buidling
1133 Pine Street
St. Louis, Missouri 63101

District Office
Jacksonville, Florida

RFB:ps

THIS FORM IS TO BE USED ONLY BY THE SECRETARY OF THE BOARD OR AS OTHERWISE SPECIFICALLY DIRECTED BY THE BOARD.	FORM NO. G-31 UNITED STATES OF AMERICA RAILROAD RETIREMENT BOARD TRANSCRIPT OF BOARD ORDERS	TRANSCRIPT NO. Special PAGE 1 OF 1 PAGES DATE TRANSCRIPT RELEASED

I CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT TRANSCRIPT OF BOARD ORDER(S) NUMBERED 81-75, TRANSCRIBED FROM THE RECORD OF PROCEEDINGS OF August 18, 1981

R. L. Butler
SECRETARY OF THE BOARD

37-A

B.O. 81-75

DECISION IN RAILROAD RETIREMENT ACT CLAIMS APPEAL DOCKET NO. 1894, CHARLES L. STRIBLING, R.R.B. NO. A-718-12-4337

Each member of the Board having reported that he had examined the record in the appeal of Charles L. Stribling from the decision of the appeals referee and had considered the evidence and argument presented therein,

the Board unanimously renders the decision set forth in the opinion of the Board, RAILROAD RETIREMENT ACT CLAIMS APPEAL DOCKET NO. 1894, CHARLES L. STRIBLING, R.R.B. NO. A-718-12-4337, affirming the decision of the appeals referee.

RAILROAD RETIREMENT BOARD

Appeal of	)	Railroad Retirement Act Claims
Charles Stribling	)	Appeal Docket
R.R.B. No. A-718-12-4377	)	No. 1894

This appeal involves the correctness of certain computational procedures used in determining the amount of appellant's annuity under the provisions of the Railroad Retirement Act of 1974.

Under that Act, annuities are comprised of two tiers and, in certain cases, a dual benefit windfall. At issue here is whether the husband's benefit being received by Mr. Stribling under the Social Security Act should have been deducted from the First tier of his railroad retirement annuity. Also, whether he is entitled to a windfall component.

Tier I is based on the employee's railroad service and social security earnings, if any, and uses the Social Security Act formula. Section 3(m) of the 1974 Act states that the first tier of an employee annuity shall be reduced by the amount of any monthly benefit payable to the annuitant under title II of the Social Security Act. The use of the term "any" plainly requires that the reduction be made whether the social security benefit is derived from or based on the earnings of a spouse or anyone else. Appellant became entitled to a husband's benefit under title II of the Social Security Act effective August 1, 1977, as a result of the holding of the U.S. Supreme Court in Califano v. Goldfarb, 430 U.S. 199 (1977) that the dependency requirement imposed by the Act for that benefit was discriminatory and unconstitutional. The Board finds that the amount of that benefit was properly deducted from appellant's first tier.

Employees who meet one of the vesting requirements of Section 3(h) are entitled to a windfall component which was intended to replace or partially to replace the reduction for social security entitlement in tier I. The Board's General Counsel previously considered the question of the windfall entitlement of individuals such as appellant, and issued an opinion on April 14, 1977, L-77-256 (Exhibit I). The Board approved and adopted that opinion and declines to follow the decision reached in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), referred to by appellant's attorney. The Board finds that appellant is not entitled to a windfall component.

Railroad Retirement Act	R.R.B. No.
Claims Appeal Docket	A-718-12-4337
No. 1894	Charles Stribling

DECISION

The decision of the appeals referee is affirmed.

/s/ William P. Adams
WILLIAM P. ADAMS, Chairman

/s/ C. J. Chamberlain
C. J. CHAMBERLAIN, Member

/s/ Earl Oliver
EARL OLIVER, Member

Ex. 1
April 14, 1977

L-77-256
M-20

Director of Retirement Claims

General Counsel

Application of sections 3(h)(3) and 3(h)(4) with respect to male annuitants entitled to husbands' or widowers' benefits under the Social Security Act

The United States Supreme Court recently held that the dependency requirements imposed on husbands and widowers under the Social Security Act are unconstitutional. As a result, men who otherwise qualify for husbands' or widowers' benefits under the Social Security Act may receive such benefits regardless of dependency. A question has arisen regarding the effect of receipt of a husband's or widower's benefit under the Social Security Act on the computation of an

employee age and service annuity which might be payable to the beneficiary under the Railroad Retirement Act of 1974.

Employee annuities are computed as provided in section 3 of the Railroad Retirement Act of 1974 (45 U.S.C. section 231b), and are comprised of various benefit components including the social security level component, the staff component and, in certain instances, the windfall component.

The social security level component calculated under section 3(a)(1) of the Act is an amount equal to the benefit to which the individual would have been entitled under the Social Security Act had all his employment after 1936 been covered by the Social Security Act. The social security level component is then reduced pursuant to section 3(m) of the Act by the amount of <u>any</u> benefit which the individual receives under Title II of the Social Security Act. The amount of the reduction,

or a portion of that amount, may be restored to the individual under section 3(h) of the Act as the windfall component of his benefit if he meets the requirements imposed with respect to that component.

The amount of the social security level component of an individual's railroad retirement annuity would be reduced under section 3(m) of the Railroad Retriement Act by the amount of a husband's or widower's benefit payable to the individual under the Social Security Act. Thus, in the case of an individual newly entitled to a husband's or widower's benefit under the Social Security Act who is also entitled to an employee annuity under the Railroad Retirement Act, the social security level component of his annuity will be reduced by the amount of the social security benefit which he receives. The question then becomes whether a windfall component would be payable in the case of such an individual.

Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act of 1974 make provision for the addition of a windfall component to the amount of the annuity payable to an employee where the social security level component of the annuity had been reduced by reason of entitlement to a spouse's, widow's, or widower's benefit under the Social Security Act. Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act provide as follows:

> "(3) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who * * * is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or

widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to

January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment' as defined in that Act.

"(4) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who * * * is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an

amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security

Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment' as defined in that Act." (Emphasis added.)

As can be seen from the above, sections 3(h)(3) and 3(h)(4) provide that the amount of the windfall component payable to an otherwise qualified individual shall be the smaller of the spouse's, widow's, or widower's

benefit to which the individual would have been entitled as of some previous date under the provisions of the Social Security Act as in effect on December 31, 1974, or the primary insurance amount to which such individual would have been entitled had all his employment between 1937 and 1975 been covered by the Social Security Act. Under the provisions of the Social Security Act actually in effect on December 31, 1974, the husband or widower of a female employee was entitled to a spouse's or widower's benefit only if he could prove that he was dependent on his spouse for a stated percentage of his support. 42 U.S.C. sections 402(c) and 402 (f). Thus, a windfall benefit under sections 3(h)(3) and 3(h)(4) would only be payable to a husband or a widower of a female social security employee where such husband or widower is able to prove dependency on his spouse as required by the Social Security

Act as in effect on December 31, 1974. No windfall would be payable to the husband or widower of a female social security employee who would not have been entitled to a husband's or widower's benefit under the provisions of the Social Security Act actually in effect in 1974.

It is my opinion that sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act should be applied as they read, and that no windfall component should be payable to an individual whose employee annuity may be reduced by reason of entitlement to a social security husband's or widower's benefit where such individual would not have been entitled to such a benefit under the Social Security Act as actually in effect in 1974. While this opinion might be questioned as, in effect, applying the now unconstitutional dependency requirement contained in the Social Security Act as in effect on December 31, 1974,

to reduce the railroad retirement benefit payable to a male annuitant, it is my opinion that sections 3(h)(3) and 3(h)(4) as so applied would not violate the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

The result achieved by applying sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act to deny a windfall benefit to individuals who would not have been entitled to any secondary benefits under the Social Security Act as in effect in 1974 is precisely the result sought by those sections and the other sections of the Railroad Retirement Act of 1974 which provide for windfall payments. The legislative history of Public Law 93-445 (the Railroad Retirement Act of 1974) clearly shows that one of the primary goals of the enactment of that Public Law was to abrogate entitlement to dual benefits under both the Rail-

road Retirement Act and the Social Security Act. See e.g., H.R. Rep. No. 93-1345, 93rd Cong., 2d sess. II (1974). Congress provided for the payment of a windfall dual benefit component only to restore dual benefits for thos7 persons who had a "vested" status with respect to benefits under both programs and who had placed reliance on receipt of benefits under both programs. Id. For those persons who did not have "vested" status under both programs, dual benefits were eliminated. Thus, individuals who had no expectations as to dual benefit entitlement at the time the 1974 Act became effective, such as non-dependent husbands and widowers, were precisely the individuals Congress intended to place outside the parameters of dual benefit protection.

Social security and railroad retirement benefits are not matters of fundamental interest or right. Ruhl v. Railroad Retirement Board,

342 F.2d 662 (C.A. 7, 1965); Richardson v. Belcher, 404 U.S. 78 (1971); and Flemming v. Nestor, 363 U.S. 603 (1960). Congress, in enacting legislation with respect to such benefits, is afforded a greater degree of latitude in imposing requirements or conditions for entitlement to those benefits than would be true were they contractual or matters of fundamental interest or right. A statutory provision which provides for the payment of social insurance benefits and which does not involve an "inherently suspect" classification comports with the requirements of the Due Process Clause so long as the provision is reasonable in terms of the remedy or goal sought to be achieved. The Court in the case of Ruhl v. Railroad Retirement Board, 342 F.2d 662, 666 (C.A. 7, 1965) stated the standard or test to be applied with respect to railroad retirement benefits as follows:

"* * * No previously vested right was disturbed by the provisions. * * * They have a reasonable basis in the light of the problems to be remedied and the purpose and object of the legislation. They do not unreasonably or arbitrarily discriminate and thereby offend the requirements of due process."

The action of Congress in enacting sections 3(h)(3) and 3(h)(4) to provide for the payment of a windfall benefit only to those individuals who had a "vested" status in and reasonable expectations to the receipt of benefits under both the Railroad Retirement Act and the Social Security Act was reasonable in view of the need to protect the financial condition of the railroad retirement program. Thus, the application of those sections to deny the payment of a windfall component

to an employee-annuitant who is entitled to a secondary benefit under the Social Security Act, but who would not have been so entitled under the Social Security Act, but who would not have been so entitled under the Social Security Act as actually in effect on December 31, 1974, comports with the Due Process Clause of the Fifth Amendment to the United States Constitution.

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General Counsel

45 U.S.C. Section 231b(h)(3)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 231a(a)(1) of this title began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(4)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (3) of this subsection, but (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975) under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this subchapter or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this sub-

chapter and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(6)

(6) No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981.

45 U.S.C. Section 231b(m)

The annuity of any individual under subsection (a) of this section for any month shall, after any reduction pursuant to paragrpah (iii) of section 231a(a)(1) of this title, be reduced, but not below zero, by the amount of any monthly benefit (before any deductions on account of work) payable to that individual for that month under title II of the Social Security Act.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

CLINTON T. FROCK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 81-2187
	)	
UNITED STATES RAILROAD RETIREMENT BOARD,	)	
	)	
	)	
Respondent.	)	

MOTION FOR SUBSTITUTION OF PARTIES

Comes now the Petitioner who requests this Court to order a substitution of parties for the following reasons under F.R.A.P. 43(a):

1. Clinton Frock died while this proceeding was pending before this Court.

2. This case is still before this Court.

3. Doretta Frock is his widow.

4. Doretta Frock desires to continue this action as his personal representative.

WHEREFORE, for the reasons stated, Petitioner requests that the Court order the substitution of Mrs. Doretta Frock for Mr. Clinton Frock, deceased, in this proceeding.

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